

On January 5, 2006 appellant, then a 47-year-old rural mail carrier, filed an occupational disease claim alleging that he sustained bilateral carpal tunnel syndrome due to factors of his federal employment. He stopped work on December 27, 2005. The Office accepted the claim for bilateral carpal tunnel syndrome and paid appellant compensation beginning January 3, 2006.

On March 10, 2006 Dr. Daniel F. Murphy, a Board-certified orthopedic surgeon, performed a left carpal tunnel release. A June 19, 2006 functional capacity evaluation (FCE), performed for Dr. Murphy, established that appellant could work eight hours per day in a sedentary/light capacity with lifting restrictions of 15 pounds. The FCE also indicated that appellant could not perform fine hand movements with the right or left hand. In an initial work conditioning evaluation dated September 29, 2006, a functional capacity evaluator indicated that Dr. Murphy had not rated appellant's work capacity on that date but noted that the June 20, 2006 FCE showed that he could perform sedentary/light work with lifting restrictions of 15 pounds.

In a report dated April 12, 2007, Dr. Murphy diagnosed residual left nerve root irritation following a carpal tunnel release. He found that appellant had permanent work restrictions in accordance with the September 29, 2006 functional capacity evaluation.

The Office referred appellant for vocational rehabilitation. In a report dated March 12, 2008, the rehabilitation counselor noted that the September 29, 2006 FCE indicated that he could perform sedentary employment. She related that appellant asserted that he was unable to drive a motor vehicle because of difficulty grasping the steering wheel.

In a progress report dated April 22, 2008, Dr. Murphy opined that appellant had "work restrictions as outlined in his FCE from September 2006. This includes sedentary to light job with [a] 15[-]pound lifting restrictions. These restrictions will not allow him to return to the previous job he had as a rural letter carrier."

The rehabilitation counselor performed a labor market survey and identified the position of telephone operator/receptionist as within appellant's work restrictions and vocational ability. She noted that the specific vocational preparation for the position was 30 days to 3 months and that the work was sedentary with occasional lifting of 10 pounds or less. The rehabilitation counselor further found that labor market surveys conducted in April 2008 showed that the positions of receptionist, customer service professional, telephone representative and switchboard operator were reasonably available within appellant's geographical area. In a report dated May 7, 2008, she noted that appellant's opportunity for successful rehabilitation was guarded as he had applied for disability benefits with the Social Security Administration and believed that he could not use his hands due to pain.

On May 7, 2008 an Office rehabilitation specialist opined that the positions of telephone operator or protective service operator were reasonably available within appellant's commuting area. She opined that he had the specific vocational preparation for the positions based on his work history and that he had the physical capacity to perform the positions.

By letter dated June 13, 2006, the Office informed appellant of its determination that the positions of protective service operator, security officer and telephone operator were within his limitations. It advised that he would have 90 days of assistance in finding a position.

On September 16, 2008 the rehabilitation specialist closed the case after unsuccessful placement.¹ By letter dated November 20, 2008, the Office notified appellant that it proposed to

¹ On October 28, 2008 the rehabilitation counselor related that appellant had cancelled meetings and did not respond to correspondence. She noted that he maintained that he was unable to drive.

reduce his compensation based on its finding that he had the physical and vocational ability to perform the position of telephone operator. It provided him 30 days to submit additional evidence or argument. The Office enclosed a description of the position of telephone operator from the *Dictionary of Occupational Titles*. The position was sedentary but required often-using hands to handle or control objects and often making repetitive motions.

On December 11, 2008 appellant related that he was submitting a report from Dr. Murphy, which established that he was unable to work as a telephone operator.²

By decision dated January 20, 2009, the Office finalized its reduction of appellant's compensation effective January 18, 2009 as he had the capacity to work as a telephone operator with wages of \$300.00 per week. It noted that he had not submitted a report from Dr. Murphy as stated in his December 11, 2008 letter. The Office calculated appellant's new wage-earning capacity in accordance with the principles set forth in *Albert C. Shadrick*.³

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.⁴ Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.⁵

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.⁶ Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the

² A report from Dr. Murphy did not accompany appellant's December 11, 2008 correspondence.

³ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

⁴ *T.O.*, 58 ECAB ____ (Docket No. 06-1458, issued February 20, 2007).

⁵ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁶ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

principles set forth in *Albert C. Shadrick*⁷ will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

The Board finds that the Office did not properly reduce appellant's compensation based on his ability to earn wages as a telephone operator. The medical evidence from Dr. Murphy, appellant's attending physician, established that he was no longer totally disabled; thus, the Office properly referred him for vocational rehabilitation. The rehabilitation counselor found that appellant had the physical and vocational capacity to perform the duties of a telephone operator. On appeal, appellant argues that he is unable to work as a telephone operator because the position requires fine hand manipulation.

The medical evidence is insufficient to support a finding that the position of telephone operator was within appellant's physical limitations. The issue of whether an employee has the physical ability to perform a selected position is primarily a medical question that must be resolved by the medical evidence.⁸ A June 19, 2006 FCE performed for appellant's attending physician, Dr. Murphy, found that appellant could work at a sedentary/light level with lifting under 15 pounds. The June 2006 FCE specified that appellant could not perform fine hand movements with either hand. On September 29, 2006 a functional capacity evaluator noted that he had undergone a June 19, 2006 FCE, which indicated that he could perform sedentary/light work lifting 15 pounds or less. In a report dated April 12, 2007, Dr. Murphy found that appellant had permanent work restrictions in accordance with the FCE.⁹ On April 22, 2008 he found that appellant could not work as a rural letter carrier but could work with the restrictions outlined in his FCE. The position of telephone operator is classified as sedentary with lifting under 10 pounds occasionally, which is within the lifting restrictions set forth by his attending physician. However, the position also requires use of the hands to handle or control objects and to make repetitive motions "often." The June 2006 FCE prohibited appellant from using his hands for fine manipulation. There is no medical evidence addressing whether the repetitive motions and use of the hands handling and controlling objects as a telephone operator constitutes fine manipulation; consequently, it is unclear whether appellant had the capacity to work as a telephone operator. The Office, therefore, has not met its burden of proof to reduce his compensation benefits based on the selected position of telephone operator.

CONCLUSION

The Board finds that the Office did not properly reduce appellant's compensation based on its finding that he had the capacity to perform the duties of a telephone operator.

⁷ *Supra* note 3.

⁸ See *Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickinson*, 46 ECAB 1002 (1995).

⁹ Dr. Murphy referenced a September 29 2006 FCE; however, the FCE was performed on June 19, 2006.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 20, 2009 is reversed.

Issued: December 8, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board